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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 26 of the Cable
Television Consumer Protection and
Competition Act of 1992)

Inquiry into Sports Programming Migration)

PP Docket No. 93-21

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys,
hereby submits its reply comments in the Commission's Further Notice of Inquiry
("Further Notice") regarding sports programming migration.

In its initial comments, NCTA urged the Commission to reaffirm its tentative
findings in the Interim Report to Congress that there is no evidence of a "migratory trend
towards cable, either overall or in individual sports."¹ Indeed, as the Commission found,
increased cable coverage of sports since 1980 has not been accompanied by a decrease in
broadcast coverage of sporting events. Rather broadcast television has increased its
coverage of sports in a variety of areas.

Nothing has changed in the past year to warrant government intervention into the
sports programming arena. The overwhelming majority of commenters on the Further
Notice confirm this view. First, the comments demonstrate that broadcast television
remains the preeminent and predominant sports distribution medium -- cable is still by

¹ Interim Report in PP Docket No. 93-21, 8 FCC Rcd 4875 (1993).

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and large a secondary outlet for sports product that broadcasters do not want to televise. Second, the record shows that cable's supplementary sports coverage has increased diversity by giving exposure to certain sports and leagues that would otherwise not be seen on television. Indeed, several college conferences commented that without cable television their schools would receive no coverage at all.² Third, there is no evidence of migration to cable. If anything, a form of "reverse migration" is occurring as broadcast television acquires programming rights to sports that were either abandoned by or held no interest for broadcasters.³

During the last year, for example, sports programming that had found a place on cable has now migrated to broadcast television. As noted by Time Warner, this trend has occurred in a variety of sports categories: CBS acquired rights to Big East and SEC college football and outbid ESPN for the rights to early rounds of the NCAA men's basketball tournament; ABC obtained the rights to the NFL Pro Bowl, which had previously been on ESPN; NBC announced that it will not take on a cable partner to televise the 1996 Summer Olympics, as it did in the 1992 Summer Games; and the NHL will broadcast games on ABC and ESPN instead of SportsChannel in order to increase its exposure.⁴

These circumstances demonstrate the highly volatile and intensely competitive nature of the sports programming market. As Time Warner points out, no one could have predicted that in the one year since the Commission initiated this inquiry, the sports world would be shaken by such developments as the National Football League move from CBS

² See e.g. Comments of Sun Belt Conference, Southland Conference, University of Denver, University Interscholastic League, Texas Special Olympics.

³ Comments of Time Warner Entertainment Company at 2-4. See also Comments of National Hockey League.

⁴ Comments of Time Warner Entertainment Company at 3.

to Fox. In updating the record in this proceeding, the commenters (with one exception) uniformly believe that consumers are being well-served by this competitive market and that legislative or regulatory action is unnecessary and unwarranted.

The Association of Independent Television Stations, Inc. ("INTV") is the only party to take a contrary view. As in last year's proceeding, INTV seeks to insulate local broadcast stations from the competitive sports marketplace. Relying on selected sports and isolated cases, the association urges the Commission to take steps to prevent "continued erosion of the position of local stations" regarding coverage of professional baseball.⁵ It recommends a variety of protective measures including FCC monitoring through annual reporting requirements, precluding cable networks from incorporating certain provisions into contracts with Major League Baseball, and mandating that a certain number of games be available on over-the-air television. INTV is the only commenter to suggest that the Commission once again adopt anti-siphoning rules.

INTV complains about ESPN's limited exclusivity rights under its contract with Major League Baseball ("MLB"), which precludes local broadcasts of particular baseball games on Wednesday nights. While we have no particular knowledge of the contents of this contract, we are aware, as are others, that exclusivity provisions of this type are quite commonplace in this industry.⁶ Moreover, as MLB noted, the upshot of this provision is pro-consumer since ESPN chose to drop all non-exclusive telecasts of games on evenings

⁵ Comments of INTV at 21.

⁶ NCTA anticipates that ESPN and MLB will file comments responsive to INTV's specific factual and legal allegations regarding the baseball agreements.

other than Sunday and Wednesday.⁷ Overall, broadcasters will be televising more baseball games in 1994 than they did prior to the original ESPN contract.⁸

INTV also seeks to restrain ESPN's ability to negotiate and bid for exclusive rights in its coverage of college football. But the limited exclusivity granted to Capital Cities/ABC and ESPN in these contracts creates significant efficiencies by aggregating games and teams, and provides greater selection opportunities and flexibility for the networks.⁹ This has enhanced the value and national availability of college games via broadcast and cable television.

Thus, as we pointed out in our reply comments on the initial Notice, INTV's call for regulatory action over televised sports is merely an attempt to return to a world where broadcasters occupied a protected and virtually unchallenged position vis-à-vis the non-broadcast media.¹⁰ But there is no reason to adopt rules that are intended to subsidize or enhance the competitive status of broadcasters, especially where there is no evidence that sports programming is being siphoned from broadcast television to non-broadcast media.

In the Further Notice, the Commission asked that any party advocating adoption of sports migration rules address the applicability of Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977) ("HBO"). INTV -- the only party to suggest that the Commission reinstitute anti-siphoning rules -- briefly discusses the HBO case, but its analysis will not withstand scrutiny. INTV argues that "the HBO decision reached several poor

⁷ Comments of the Office of the Commissioner of Baseball at 32. ESPN will carry half of the MLB games that it carried under its previous contract for the 1990-93 seasons. Id. See also Comments of ESPN at 3.

⁸ Comments of the Office of the Commissioner of Baseball at 32.

⁹ Comments of Capital Cities/ABC at 8-10.

¹⁰ See Reply Comments of NCTA in PP Docket 93-21, April 12, 1993, at 5-7.

conclusions, based on data that is no longer accurate or applicable, and utilized factual arguments that are outdated and have no relevance in the world today."¹¹

INTV places primary emphasis on the growth of the cable industry since 1977 as a reason why the HBO case would be decided differently today and poses no bar to adoption of anti-siphoning rules. But the short answer to INTV's argument is that, regardless of the growth of the cable industry since 1977, the HBO court's First Amendment objections to the Commission's previous anti-siphoning rules still are valid and its insistence that the FCC act only on a record demonstrating the need to act is still applicable today.

In this regard, the record compiled by the Commission to date provides no basis -- even for the hypothetical narrowly-tailored sports siphoning rules postulated by INTV -- for any regulatory action by the Commission. The lack of that record presents the same issues -- as both constitutional and administrative procedure matters -- that resulted in the rejection of the FCC's first attempt at anti-siphoning rules in the HBO case.

To be sure, circumstances have changed in the cable, broadcast and sports programming industries since 1977. But the significant facts driving the HBO decision -- the lack of a record on which to predicate rules which implicated the First Amendment -- are replicated by the record in this proceeding. As the HBO court said:

At the outset, we must consider whether the Commission has made out a case for undertaking rulemaking at all since a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."¹²

¹¹ Comments of INTV at 38.

¹² HBO, 567 F.2d at 36, quoting City of Chicago v. FPC, 458 F.2d 731, 742 (1971), cert. denied, 405 U.S. 1074 (1972).

The HBO Court thus made clear that any agency rulemaking requires that the rules adopted be based on a solid record foundation. Where, as here and as in HBO, the proposed rules trespass on material protected by the First Amendment, special vigilance is required. In this regard, the HBO court's conclusion with respect to the FCC's first sports siphoning rules is equally applicable to the INTV proposal:

[I]n some circumstances the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. This provision is apparently justified on the ground that it is too difficult to monitor the reasons broadcasters cut back their game schedules and that at least some cutbacks might be caused by cable competition. However, this record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible.¹³

For those reasons too, the Commission should reject the INTV entreaties to recreate constitutionally-suspect anti-siphoning rules such as those soundly rejected in the HBO case.

¹³ HBO, 567 F.2d at 51 (footnote omitted, emphasis added).

CONCLUSION

The Commission should not artificially tip the scales in favor of one delivery medium over others by recommending the adoption of sports programming rules. Consumers have benefitted from the increased quantity and diversity of local, regional and national sports offerings on both broadcast and subscription media and they are at no risk of losing access to the most highly-valued sports programming over broadcast television. The Commission should reaffirm the Interim Report's conclusions and hold that regulatory or legislative action in this area is unwarranted, unnecessary and inappropriate.

Respectfully submitted,

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